

**REMARKS**

In the Office Action, the examiner set forth an election/restriction requirement, apparently contending that the application contains claims directed to as many as 8 different purportedly "patentably distinct species". In addition, the examiner appears to have set forth a subspecies election/restriction requirement, apparently contending the presence of 6 different subspecies. These election/restriction requirements were accompanied by the examiner's indication that "a reply to this requirement must include an identification of the species that is elected ... and a listing of all claims readable thereon ..."

Applicant respectfully traverses the species election requirement as stated in the Office Action. Applicant also respectfully traverses the apparent subspecies election requirement as stated in the Office Action. The grounds for such traversal are:

- (i) Both election requirements are unintelligible, whereby applicant does not understand the species options, and thus is completely unable to respond; and
- (ii) Both species election requirements do not comply with PTO rules, namely, 37 CFR 1.146.

More particularly, the species election requirement purports to identify 8 different species by FIGURE number. However, the first choice is listed as "a. Figure \_\_\_\_\_" (underline emphasis added). The examiner did not specify ANY figure number. The application includes 25 different drawing figures. Of these, choices "b." through "h." list only FIGS. 12-19. Thus, for choice "a.", which of the remaining figures 1-11 and 20-25 are intended? At present, applicant is not in a position to guess, and thus cannot make an election.

With regard to the subspecies election requirement, 6 choices are listed, but again, the final choice is listed as "vi. Figure \_\_\_\_\_" (underline emphasis added).

BEASLEY-44737  
SN 10/721,575  
RESPONSE

For the first 5 choices "i." through "v.", the examiner lists FIGS. 1-4 and 8-11. Which of the remaining FIGS. 5-7 and 12-25 as intended for the final choice "vi."? Again, applicant is not in a position to guess, and thus cannot make an election.

Moreover, applicant is assuming that the examiner is asking for an election from among the species choices "a." through "h.", and then a separate election from among the subcategories "i." through "vi.". But, applicant respectfully notes that this is also a guess. The examiner has not clearly stated this to be the case, whereby the election/restriction requirements are profoundly unfair to applicant, and, indeed, represent a denial of due process.

Applicant also traverses the election/restriction requirements on the ground that it/they do not follow PTO rules. In particular, 37 CFR 1.146 authorizes a species election requirement in the "first" action on an application. The Office Action mailed May 13, 2005, is clearly not the FIRST action on any claim presented in this application. Indeed, with respect to many of the claims pending in this case, the recent Office Action constitutes the FIFTH Office Action (relative to numerous claims carried over from the parent, when the current CIP application was filed). In fact, the recent Office Action is not even the first action in this CIP docket; it is the THIRD Office Action in this CIP.

Applicant responded to the second Office Action in this CIP docket by tailoring all of the claims for allowance, consistent with the examiner's own indication of allowable subject matter. Clearly, the examiner has been examining all of the claims in this application on the merits, through several Office Actions dating over several years. Now, only after the claims have been placed in condition for allowance, the examiner sets forth a species election requirement (albeit a completely unintelligible one). Such is not permitted by 37 CFR 1.146.

Withdrawal of these unintelligible and untimely election requirements are clearly in order.

Applicant has previously placed the claims in condition for allowance. A formal Notice of Allowance is clearly in order.

Respectfully submitted,

KELLY LOWRY & KELLEY, LLP



Stuart O. Lowry  
Registration No. 26,563

SOL:cw  
6320 Canoga Avenue, Suite 1650  
Woodland Hills, California 91367  
(818) 347-7900